In our present case, no explanation at all, let alone reasonable or otherwise, was given.

Secondly, there is, in this case, the plea of guilt and admission by the accused to the charge of using the vehicle with its handbrake not being properly maintained. According to the record, the plea was made on June 10, 1982 and the date and time of user as stated in the charge and in the fact given by the prosecution were 2315 hours or 11.15 p.m. on July 11, 1981. Subsequently, however, the three charges in the present appeal were amended and it was ascertained in this appeal from counsel that the amendment was the alteration of the time "2315" hours to "2200" hours. In the circumstance, the guilty plea and the admission of fact by the accused are of no help to the prosecution.

With the exclusion of the accused's statement, exh. P5, and the evidence of P.W.4 relating to the accused's admission, it is, as indeed rightly conceded by the prosecution, obvious that the convictions cannot stand and that the appeal by the prosecution against the order of discharge and acquittal respecting the charge of careless driving must also fail.

For the above reasons, the appeal of the prosecution against the order of discharge and acquittal is dismissed while that of the accused is allowed and the convictions are set aside. The fines, if already paid, be refunded to the accused and the order of suspension of his driving licence and the indorsement of the particulars of his convictions therein be set aside.

Order accordingly.

Solicitors: *Cheng & Ting Co.*

PUBLIC PROSECUTOR v. LIM KIN ANN

[O.Cr. J. (L.C. Vohrah J.) May 16, 1987]

[Johor Bahru – Criminal Trial No. 4 of 1984]

Criminal Law – Dangerous drugs – Trafficking in 383 gm. of heroin on own behalf – Prima facie case – Defence of denial – Sentence of death – Dangerous Drugs Act 1952, s. 39B(1)(a) & (2).

Evidence – Statement by accused before arrest – Caution not administered – Admissibility of statement – Dangerous Drugs Act 1952, s.37A(1)(b) – Criminal Procedure Code (F.M.S. Cap. 6), s.15(i).

Criminal Procedure – Arrest – "After his arrest" – Criminal Procedure Code (F.M.S. Cap. 6), s. 15(i) – Dangerous Drugs Act 1952, s. 37A.

The accused was charged with trafficking on his own behalf a dangerous drug, *i.e.* 383 grammes of heroin, in contravention of section 39B(1)(a) of the Dangerous Drugs Act 1952. On May 19, 1983, Probationary Inspector Yeow (PW1) led six detectives to house No. 23, Jalan Pasir Pelangi, Johor Bahru, where he found, among other things, two black brief-cases (P.8A and P.8B) which the accused said were his. The accused opened P.8A where Yeow found, among other things, cash of M$15,300. The accused refused to open P.8B, which Yeow prised open with a test-pen. In P.8B Yeow discovered, among other things, three packets (P.37A, P.37B, and P.37C), a small daching (P.38), a plastic spoon (P.33A), a metal spoon (P.33B), 8 plastic packets (P.36) and two pieces of newspaper (P.35). The accused then offered Yeow $50,000.00 to drop the matter. Yeow rejected the offer. The accused was then arrested. The three packets were found by the government chemist to contain 383 gm. of heroin. At the close of the prosecution case, counsel for the accused contended that all statements uttered by the accused surrounding the examination of the contents of the 2 brief-cases were not admissible under s.37A(1)(b) of the Act because no caution had been administered prior to the making of the statements and should therefore be expunged from the record. The learned judge held that the statements were made before arrest and were therefore admissible. He called upon the accused to make his defence.

The accused gave evidence on oath and his was the only evidence for the defence. In a nutshell it was a denial of the admission he made regarding ownership of the incriminating brief-case P.8B and of the knowledge of the contents therein.

Held: (1) in the light of all the evidence in this case, the defence did not raise any doubt in the prosecution case. The learned trial judge did not believe the accused's story. On the contrary, PW1 and PW4 and PW6 were truthful witnesses and the defence went to strengthen the prosecution case;

(2) the accused was found guilty as charged, convicted and sentenced to death.

Case referred to:

(1) *Public Prosecutor* v. *Salleh bin Saad* [1983] 2 M.L.J. 164.

CRIMINAL TRIAL.

Saufee Effandi (Deputy Public Prosecutor) for the Public Prosecutor.

Elyas Majeed for the accused.

Cur. Adv. Vult.

L.C. Vohrah J.: The accused was charged with:

"That you on 19.5.1983 at about 11.00 a.m. at house No. 23, Jalan Pasir Pelangi, in the district of Johor Bahru, in the State of Johor, did on your own behalf traffic in dangerous drug, to wit, 383 grammes of heroin and you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the said Act."

On May 19, 1983, at about 10.30 a.m. acting on information received Probationary Inspector of Police Phillip Yeow Boon Bee (PW.1) led a team of six detectives comprising Detective Corporal Ajaib Singh (PW.4), Detective Corporal Zulkifli bin Idris (PW.6), Detective Rahim bin Yusof, Detective Mohd Sohod bin Johar, Detective Abdul Hamid bin Musa and Detective Harun bin Ahmat to house No. 23, Jalan Pasir Pelangi. After keeping observation of the front of the house and finding that the front door was locked, PW.1. led PW.4, PW.6 and Detective Rahim to the back of the house leaving the other members of his party to keep watch on the front of the house. PW.1 together with PW.4 and PW.6 entered the back of the house through the open back gate and after identifying himself obtained the permission of a Malay woman in the kitchen to enter the house through the back door. He then requested the woman to unlock the door separating the kitchen area from the living area in the front portion of the house and upon entering the living area, he instructed PW.6 to open the front door to let in the other members. PW.1 then knocked on the door of the front room adjoining the road uttering the word "Police." The door was opened slightly by one Poo See Sai (PW.8) who then attempted to shut it back. PW.1 together with PW.4 and Detective Rahim pushed the door open and entered the room. Inside, apart from PW.8, they found three other persons who were all lying down. The accused and a Malay woman were lying on a bed and one Chua Swee Tian (PW.10) was lying on the floor. PW.1 asked these three persons to get up and proceeded to examine the room. PW.1 saw, among other things in the room, two black brief-cases standing beside each other, one larger (P.8A) than the other (P.8B). He also found another brief-case brown in colour (P.8C) underneath the bed. When he enquired of the four occupants of the room to whom the three brief-cases belonged the accused answered that P.8A and P.8B were his. PW.1 then asked the accused to open the two black brief-cases. The accused opened P.8A wherein PW.1 found, *inter alia*, cash comprising M$15,300/– (P.9A), S$50/– (P.9B) and B$16/– (P.9C), a Southern Banking Berhad Savings Account Book for Account No. 1899 in the name of the accused (P.17), a receipt from Asian Maju Sendirian Berhad made out in the name of the accused (P.24) and two Southern Banking Berhad Cheque Books (P.29A and P.29B) with the name of the accused printed on the cheques in cheque book P.29A. After having sight of the contents of P.8A, PW.1 then asked the accused to open P.8B which had the letters "LIM" stuck on it. The accused refused to do so and requested PW.1 to take the money in P.8A and to desist from requiring that P.8B be opened. PW.1 however insisted but the accused still refused whereupon PW.1 prised it open with a test-pen. In P.8B PW.1 discovered, *inter alia*, three packets (P.37A, P.37B and P.37C) which he suspected to contain drugs, a small daching (P.38), a plastic spoon (P.33A), a metal spoon (P.33B), 8 plastic packets (P.36) and two pieces of newspaper (P.35). When PW.1 opened P.8B the accused offered him $50,000/– to drop the matter. PW.1 rejected the offer, closed P.8B and then enquired as to the ownership of P.8C. PW.8 claimed ownership and was consequently asked to open it. In it PW.1 found a passport in the name of PW.8 (P.39) and a letter written in Chinese characters (P.40). After the examination of P.8C, PW.1 directed PW.4, PW.6 and Detective Corporal Rahim to handcuff the accused and informed the accused and the other occupants that he was arresting them.

This was the evidence of PW.1 and his story with regard to the discovery of the three brief-cases P.8A, P.8B and P.8C, the admission of ownership of the two brief-cases P.8A and P.8B to him by the accused, his prising open of P.8B after the refusal by the accused to do so, the accused's attempt to bribe him into not opening P.8B wherein P.37A, P.37B and P.37C were found, and the arrest of the accused thereafter, was substantiated by PW.4 and PW.6.

PW.1 testified that all the articles he recovered in the room were handed over to the investigation officer, (then) A.S.P. Mohd Zainal bin Mohd Zain (PW.11). PW. 11's evidence was that several articles were handed over to him by PW.1 including the

specific items P.33A, P.33B, P.35, P.36, P.37A, P.37B, P.37C and P.38 and that after taking custody of the articles on May 24, 1983, he wrapped and sealed them with Polis Di Raja Seal No. 244 and personally handed them over to the government chemist, Mr. Cheong Meow Kioon (PW.5), at the Chemistry Department for analysis. PW.5 on analysis found the 3 packets P.37A, P.37B and P.37C to contain a total weight of 383 grammes of heroin and P.33A, P.33B, P.35 and P.36 to bear traces of heroin.

At the close of the prosecution case, counsel for the accused contended that the statement made by the accused admitting ownership of P.8B and all statements uttered by the accused surrounding the examination of the contents of the two brief-cases were not admissible under section 37A (1)(b) of the Dangerous Drugs Act because no caution had been administered prior to the making of the statements and should therefore be expunged from the record. Section 37A reads:

"(1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not interpreted to him by any other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid –

(a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect –

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.'

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

(3) Where a statement is purported to be made by a person charged with an offence against this Act under and in accordance with section 113 of the Criminal Procedure Code, the statement so made shall be deemed to have been made under and in accordance with this section."

He based his contention on the ground that his cross-examination of the police witnesses PW.1, PW.4 and PW.6 had revealed that the occupants of the room would have been prevented from leaving the room if they had attempted to do so and their submission amounted to their having been in custody and therefore under arrest. In equating custody to arrest, counsel referred for authority to section 15(i) of the Criminal Procedure Code (F.M.S. Cap. 6) which reads:

"In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action."

and to the annotation in *Mallal's Criminal Procedure Code*, Fourth Edition, (at page 50) which reads:

"Arrest is a restraint of a man's person or his submission to the custody that he may be held to answer a charge made against him."

He also referred to certain general propositions in *Prem's Criminal Practice 1864-1955*, Fifth Edition, at page 630, relating to the inadmissibility under sections 26 and 27 of the Indian Evidence Act (on which our own Evidence Act, 1950 is based) of any confession made to a police officer by a person while in police custody in an attempt to demonstrate that the accused's lack of freedom to move whilst in the room in the presence of the police personnel amounted to his being in police custody and, therefore, under detention and, accordingly, this detention amounted to "arrest" for the purposes of section 37A of the Dangerous Drugs Act. I did not agree. Section 15 of the Criminal Procedure Code, in my view, merely explains how an arrest is to be effected and the evidence did not show that the accused had submitted to PW.1's custody so that he might be held to answer

a charge made against him. The propositions in *Prem* related in each case to the circumstances which constituted "custody" for the purposes of sections 26 and 27 of the Evidence Act and cannot, in my opinion, be equated with the word "arrest" in section 37A of the Dangerous Drugs Act. With respect, I agree with the interpretation given by Syed Agil Barakbah J. (as he then was) in *Public Prosecutor* v. *Salleh bin Saad*[1] to the words "after his arrest" in proviso (b) to section 37A to mean after actual arrest when His Lordship admitted certain incriminating answers by an accused person to a senior officer of customs conducting a customs raid during which two sacks containing blocks of morphine and one sack containing slabs of raw opium were recovered before arrest was effected. The specific provisions of section 37A providing for the admissibility of statements made voluntarily to a police officer of or above the rank of Inspector by a person before his arrest are clear and unambiguous. The evidence of PW.1, corroborated by the evidence of PW.4 and PW.6, relating to the making of the statement of the accused claiming ownership of the two brief-cases did not appear to me to have been caused by any inducement, threat or promise proceeding from anybody in authority. In my view, at the time when PW.1 entered the room with his men and put the question generally to the occupants in the room he was there, it seemed obvious to me, in the course of a police investigation and the statements were made by the accused to or in the hearing of PW.1 who was conducting his examination of the room and the articles therein in the course of that investigation. Although at that time PW.1 was only a probationary Inspector of Police, he was a police officer of the rank of Inspector by virtue of section 2(2) of the Police Act, 1967 which reads:

"Any reference in this Act and any other written law to police officer of a certain rank shall include any police officer who is acting, or on probation or cadetship, in such rank and this subsection shall be deemed to have been an integral part of this Act as from the commencement of the Act."

PW.1, PW.4 and PW.6 all testified that the arrest was effected only after the statements were made by the accused and after the discovery of the three incriminating packages P.37A, P.37B and P.37C. I accordingly held that the statements were made before arrest and therefore admissible as there was no requirement for the statutory caution to be administered.

As the statement of the accused admitting ownership of the brief-case containing the 3 packages P.37A, P.37B and P.37C was made, in my view, before any arrest had been effected and the making of the statement appeared to me to have been made voluntarily by the accused in answer to a question put by PW.1 generally to all the four occupants of the room and as the evidence showed that he was unwilling to have it opened, I was satisfied when the case for the prosecution had concluded that a *prima facie* case had been made out against the accused for possession of 383 grammes of heroin defined as "dangerous drug" under section 2 of the Dangerous Drugs Act 1952. Quite apart from the presumption contained in section 37(da), from the *presence* of the daching P.38, the empty plastic packets P.36, the two spoons P.33A and P.33B and the two pieces of newspaper P.35, all bearing traces of heroin, and from the large amount of cash found in P.8A, I was also satisfied that the prosecution had made out a *prima facie* case of trafficking in heroin against the accused and I called upon him to make his defence.

The accused elected to give his evidence on oath and his was the only evidence for the defence and in a nutshell it was a denial of the admission he made regarding ownership of the incriminating brief-case P.8B and of knowledge of the contents therein.

He stated that he came to Johor Bahru in 1982 and rented a house at No. 11, Jalan Chermat Ampat, Taman Maju Jaya at a rental of $450/– to $460/– per month. Before coming to Johor Bahru he was growing coffee in a small-holding in Senggarang near Batu Pahat. He was able to afford this rental because he had found employment as a captain in a lounge bar in Johor Bahru called "Mee Xim Bar." His basic salary as bar captain was $450/– per month but his takings in tips well exceeded $3,000/– per month so that he was actually earning an income of $4,000/– to $5,000/– per month. He became a drug addict in 1982 and spent about $1,200/– per month for his addiction. He obtained his supply of drug regularly from a few persons, one of whom was Zakiah binti Shahar who then worked at a coffee house/bar called "Rex Inn" of which he was a sleeping partner having paid $10,000/– as his share of the partnership. Zakiah was known to him as Siow Lim and she spoke Mandarin as her mother was a Chinese who had converted to Islam. He used to visit Rex Inn four or five times a week after closing time at Mee Xim Bar at 2.30 a.m. He and Zakiah became lovers and they slept together in her room at No. 23, Jalan Pasir Pelangi

which had been rented to Zakiah's mother for the benefit of Zakiah. Three of Zakiah's brothers, her sister-in-law and a married couple also lived in that house where her mother also stayed when she not living in Singapore. He did not have the key to the house or the room in question and could only gain entry into the room if Zakiah was present. Whenever he needed to have a smoke he would visit Zakiah at the house and would then sometimes spend the night with her. Whenever he purchased drug from her he only had to pay $50/– for a packet instead of the normal price of $70/–. As to his association with PW.8, he first came to know PW.8 when they were serving a prison sentence in Seremban together in 1981, he for smoking ganja. They became friends and after their release they met by accident in Johor Bahru in 1982 when he gave PW.8 his address as No. 11, Jalan Chermat Ampat and told PW.8 that if PW.8 could not find him there then PW.8 would be able to find him at No. 23, Jalan Pasir Pelangi. He met PW.8 a second time in Johor Bahru when PW.8 was looking for a job and they got together and smoked. On this occasion Zakiah was working at Rex Inn and was introduced to PW.8 as his girlfriend. The three of them had occasion to smoke together in the room in question prior to the arrest and PW.8 had slept there. The drug they smoked had been procured by him from a source other than Zakiah. As regards PW.10, he first came to know PW.10 six months after his meeting with PW.8 in Johor Bahru when PW.8 was looking for employment. He did so when he visited a seafood restaurant one night and was served by PW.10 who worked there. He recognised PW.10 as an addict when they first met and a friendship developed between them. PW.10 knew Zakiah and PW.8 as he used to bring PW.8 and PW.10 to the house. The four of them spent the night in the room immediately before their arrest. At that time he had actually not been working for about five months as he had accumulated savings of over $30,000/– in cash with which he planned to set up a poultry-farm in a rubber-holding in Senggarang belonging to his brother-in-law. He had in fact decided to return to Senggarang on May 18, 1983 with the ready cash to carry out his scheme but on that particular day PW.8 and PW.10 found him at No. 11, Jalan Chermat Ampat and enlisted his assistance to find employment for them. He promised to help and in order to keep them company he postponed his trip back to Senggarang. The three of them then decided to go to Zakiah's room for a smoke together that night. He had already in his possession 3 packets of drug which he had bought in town to take back with him to Senggarang for his own use. When they went to Zakiah's room between 5 p.m. and 6 p.m. after dinner, he brought along with him the brief-case P.8A containing his personal belongings including the cash which had been produced in Court. Zakiah let them into the room. In the room he saw, among other things, a bed, a small side-board about 3 feet high, a small table and a brief-case resembling P.8A but smaller in size which was lying on the floor on the left side of the bed. It was similar to P.8B. After entering the room he placed P.8A on the other side of the bed and immediately all four of them began to have a smoke together using the drug he had in the 3 packets in his possession. They stopped smoking at 10 p.m. in order to have supper and after supper they resumed smoking until about midnight. He was the first person to go off to sleep and he was only awakened by the presence of people in the room. They searched the room and discovered remnants of drug on the small table. They also searched some clothing and found drug in the shirt belonging to him. He admitted ownership of the drug on the table and in the shirt. They continued their search and subsequently found three brief-cases including P.8A which had a combination lock. He opened P.8A at the request of PW.1. P.8B was alongside P.8C when PW.1 recovered P.8C on the right side of the bed. He admitted ownership of P.8A to PW.1 but he did not hear PW.1 enquire about the ownership of P.8B. He denied having admitted ownership of P.8B at any time. He did not see PW.1 prise open P.8B nor did he offer the sum of $15,000/– to PW.1 as an inducement not to open the brief-case. Accordingly, the allegation of his having offered PW.1 $50,000/– could not be true. He was not aware of the existence of the letters "LIM" on P.8B as it did not belong to him at all. He did not deal in drugs and he never had in his possession any drug amounting to 383 grammes. He had so much money in P.8A on the day he was arrested because on the previous day he had put his savings inside it with the intention of returning to Senggarang for good in order to start his poultry-farm. He did not take along any clothes at that time because he had clothing in his hometown. He never regarded the house at No. 23, Jalan Pasir Pelangi as his permanent address. Although he left his job at Mee Xim Bar at the end of 1982 he kept depositing money into his banking account thereafter but these deposits came from his partnership income derived from Rex Inn.

I viewed his evidence in the light of all the evidence in this case but I found that the defence did not raise any doubt in the prosecution case.

The accused in evidence-in-chief denied having heard PW.1 request him to open P.8B but in cross-examination he stated that he *refused* to open the brief-case when requested to do so by PW.1 because it did not belong to him. I was more than satisfied that PW.1 did enquire about the ownership of P.8B and that the accused well knew what the contents of the brief-case were when he refused to open it. I also found it hard to believe that the large amount of money found in P.8A was derived from savings made by him from tips he received as a bar captain. Further, I found it incredible that anybody with such a lucrative source of income would give it up for an arduous, if not financially risky, existence as a poultry-farmer in some remote town. I did not believe the accused's story. On the contrary, I found PW.1, PW.4 and PW.6 to be truthful witnesses and the defence went, in my view, to strengthen the prosecution case.

I, accordingly, found the accused guilty as charged and convicted him. I sentenced him to death.

Order accordingly.

Solicitors: *Elyas Majeed & Co.*

HENG BAK TEONG & ANOR. v. NG AH SENG

[O.C.J. (Mohamed Dzaiddin J.) June 8, 22, September 3, October 20 & November 2, 1987]

[Penang – Originating Motion No. 32-28-87]

Land Law – Transfer and charge documents – Registration of – Rejection of documents – Encumbrance on title – Encumbrance on order of court – Whether order of court prohibitory order or injunction – Injunction in substance – Injunction does not protect title – Removal of order restraining dealings – Order for.

The applicants agreed to purchase certain lands from one Wong Choon Sim @ Ong Choon Sim. They executed a sale and purchase agreement the same day, and after payment of the full purchase price, the vendor executed a transfer of the property in favour of the applicants. However, when the applicants sought to register the transfer and a charge document (which was also created), the Registry of Land Titles rejected the documents because there was an earlier order of court dated October 10, 1983 lodged against the registered owner. The order of court was obtained by the respondent who was the plaintiff in another civil suit and the registered owner was the defendant.

By way of the present originating motion, the applicants sought to set aside the order of court made on October 10, 1983 and for an order directing the Registrar of the Land Titles Registry to cancel the lodgment of the said order on the title to the property.

Held, allowing the application: (1) the order dated October 10, 1983 was in substance an injunction order granted by the court against the registered owner restraining the sale and charge of the said property to a third party;

(2) in the present case, the court had rightly granted the said order restraining the registered owner from transferring or charging or in any way dealing with the said property until after the trial of action or further order;

(3) however, an injunction does not accord statutory protection of the purchaser's interest under the National Land Code and therefore is not registerable or indorsable on the title to the said property;

(4) the Registrar of Land Titles was wrong in registering the said order of court as a prohibitory order nor is there any provision in the National Land Code for an injunction order to be registered on the title to the said property binding all and sundry;

(5) an order was made directing the Registrar of Land Titles to expunge and remove from the instrument of title of the property the order of court dated October 10, 1983.

[*Editorial Note:* The respondent is appealing to the Supreme Court against the whole of the above decision.]

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

(2) *Hope* v. *Carnegie* (1868) L.R. 7 Eq. 254.

ORIGINATING MOTION.

Lim Kim Chuan for the applicants.

R. Rajasingam for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: By this originating motion the applicants seek to set aside the order of court made on October 10, 1983 and for an order directing the Registrar of Land Titles, Penang, to cancel the lodgment of the said order on the title to the property in question.

The complaint of the applicants appear to be based on the following facts. On September 22, 1983 they agreed to purchase from one Wong Choon Sim @ Ong Choon Sim ("the registered owner") all the piece of land known as Plot No. 809 No. P.T. PTBM/C. 005 bearing Suratan Hak-